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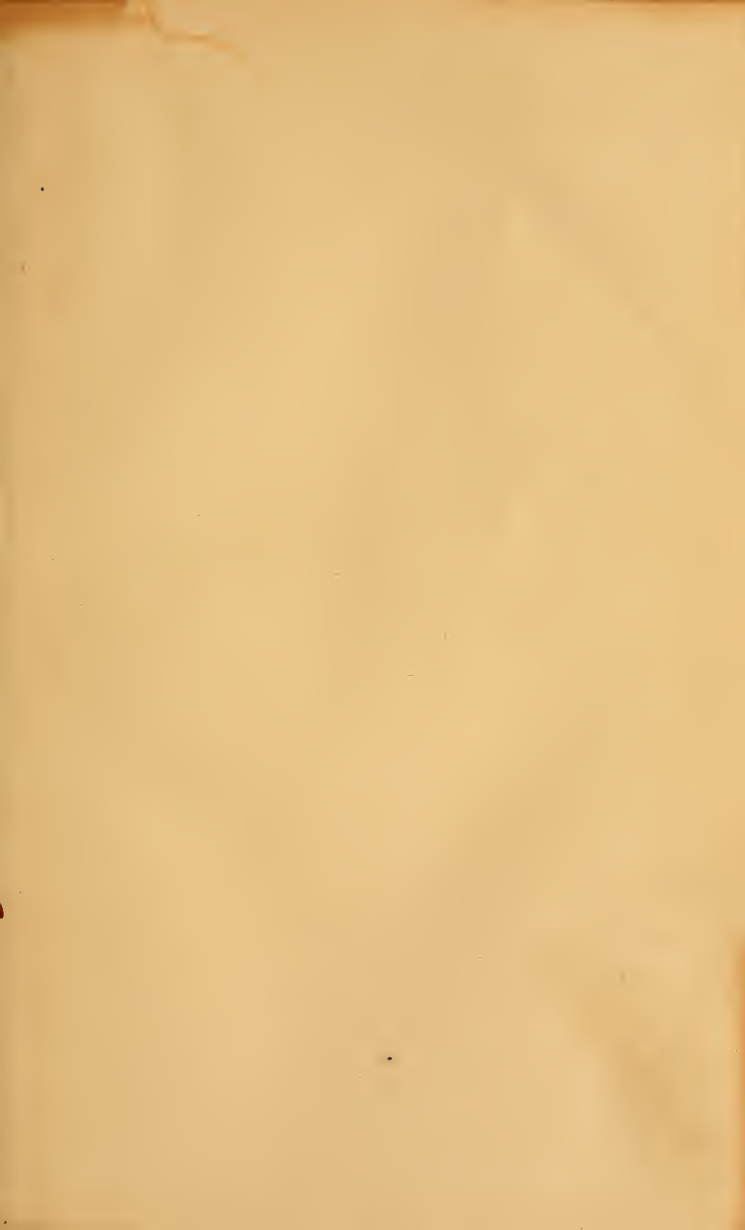
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THE CITIZEN IN RELATION TO THE STATE:

A PAPER

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AMERICAN BAR ASSOCIATION,

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BY

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There has undoubtedly been within the last generation a steady increase in the control asserted by the State over the habits of its Citizens, for some account of which reference may be had to the article "Government."—Encyclopedia Britannica.

A State, like an Individual, accused of having inflicted wrong upon another, may shape its defence against the charge with reference to the FACTS or to the LAW.—(Phillimore, International Law, Vol. III, 3d Ed., page 64.)

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THE CITIZEN IN RELATION TO THE STATE.

Jurists have considered Man in a threefold view: as an animal, (that is, a sensitive creature,) as a being endowed with reason, and as a member of a particular society. Hence the divisions of law to which he has been subject: 1st, the Law of Nature; 2d, the Law of Nations; 3d, the Civil or Municipal Law. It is particularly in his political relation that I propose briefly to consider the individual in this paper. And this consideration suggests appropriately some reference—(1) to the State, (2) to State organization and function, (3) to States in their international relations, and (4) to the citizen in relation to the State. It has been thought that a presentation of one or two aspects of the subject in this order might prove suggestive, if not profitable, at this time, when much of the literature and discussion of the period gives evidence of the entertainment by not a few persons of somewhat vague and confused ideas in respect to the rights and duties of citizenship, and in regard to the purposes and limitations of government.

I.

The first and controlling principle in respect to States is the natural and indestructible equality of States. A recognition of this principle is universal in the policy of modern States; and in one sphere of intellectual exertion it finds expression in the axiom—"On the field of diplomacy Switzerland and Russia meet as equals." A philosophic writer calls it the supreme principle of modern international law. The polity of the ancients was founded upon the inequality of Nations. Up to this date modern polity has been a combination of ancient maxims and principles of Christianity.

Independence is said to be one of the essential marks of a State. And while it is true that a State must be independent of external control in domestic concerns, more prominence has in modern times been given to the ethical element, and the conception of the interdependence of States has been substituted for that of their independence. As primitive man when he entered into the community yielded something of absolute independence in return for

certain guarantees which were deemed compensatory, so a State, when it enters or is received into the commonwealth of States, surrenders absolute independence in exchange for advantages which are supposed to be correspondent. Equality and reciprocity thus become fundamental conditions in determining the obligations of States. Even statesmen are prone to forget that there is a necessary connection and correspondence between international rights and international liabilities.

There are certain constituent elements and properties which are involved in the idea of a State, and these are held to be essential to its constitution and existence. They are *people, territory, union, law, order, government, sovereignty, independence, autonomy, and stability*. But first in importance and appropriate relation are *people, union, order*.

The most satisfactory definition of a State which has come under my observation is furnished by the father of modern public law. All succeeding attempts to describe a State have been either amplifications or variations of this definition. "*A State*," says Grotius, "*is a complete or self-sufficient body of free persons united together for the common benefit to enjoy peaceably their own rights and to do right to foreigners.*" This statement of the *raison d'être* of a State is as exact as it is terse. It contains all the essential elements of which political wisdom and morality in this relation are composed. It should be engraved upon the seal of every State; and it deserves to be borne in constant mind by statesmen. It will be convenient, however, for the purposes in view, to present other and later definitions which indicate the growth, development, and current appreciation of the State function.

A contemporary writer says:

"A State is not a mere abstraction, an ideal being standing between earth and heaven, superior to the entire body of citizens, invested with mysterious power derived one knows not whence, incapable of doing wrong, inaccessible to a sense either of mercy or of justice, and irresponsible to any one for its acts. It is in our time-honored Anglo-Saxon theory of government a thing of flesh and blood, made up of the chosen men of the community, intrusted for the time being with the duties of making laws for the common good, and of executing them; of devising all necessary means for securing the peace, prosperity, and happiness of the entire body of citizens."

"A State," says Johnston, "is a separate community of human beings associated in natural and jurial relations, dwelling in its own

proper territory under an organized civil Government, self-existent, autonomous, and sovereign.

"The first conception in this definition of the State looks to the persons who compose it; they are the members of the body politic. *Collectively*, they are *the people*, which term includes every individual belonging to the State, and is sometimes used to express the idea of the State.

"This '*cætus multitudinis*' is, however, from the nature of things, incapable of giving expression to its will, except through an organ sanctioned by prescription and general consent. It is chaotic, inarticulate, and inoperative, except through the intermediation of the body of its citizens. Among other attributes of the State and its sovereignty is that of determining the *conditions* and *qualifications* which shall entitle individuals generally within her territory or under her jurisdiction to natural protection." *

Within narrower limits the State exercises the further right to say who shall be deemed "citizens" or "subjects," with reference to the enjoyment of certain privileges and immunities not extended to the masses of the population.

These latter, however, under many systems of Government constituting a large majority of the populace, are entitled to National protection in return for the allegiance which they yield to the State. The first class is composed of the individuals in the community who are invested by the actual government with full *political privileges* as well as *civil or social rights*; while the second class comprises those who enjoy *civil or social rights* only, but are not invested with *political privileges or powers*. In a word, the one class enjoys *absolute*, the other *relative* rights. I am constrained, in the absence of a more exact expression in our language, to make use of the term "POLITICAL" as ordinarily employed in discussions of the subject in hand.

II.

Among *political privileges or powers* may be enumerated the right to vote and to hold office; among *civil (social) rights* is the right to protection and security to person and property under the *fundamental law* of the society of which individuals happen to be members.

The difference between fundamental rights and those created by and chargeable to positive law is familiar to the profession.

*A Theory of the State.

Absolute and material rights are those which adhere to persons merely in a state of nature.* It will be seen that the enjoyment of the highest and most valuable privileges or powers of citizenship are practically much qualified and restricted. They are under the control of and are regulated by the actual *positive* law, which represents the sovereignty of the State; whereas the enjoyment of the customary rights which pertain to the masses of the population under the *fundamental* law are practically unqualified and unrestricted.

In addition to protection to life, liberty, and property, the class which exercises *political privileges* in a community participates in the governing power, either by themselves or their representatives.

The class which enjoys *civil* (social) *rights* is equally entitled to complete protection to life, liberty, and property; but the individuals composing it cannot exercise *political privileges or powers* under any claim founded simply upon *civil* (social) *rights*.

The distinction between *citizens* proper, that is, the constituent members of the political sovereignty, and *subjects* of that sovereignty, who are not therefore *citizens* within the Aristotelian meaning of the term, is recognized in the best authorities of the public law.

This restriction of political power in the hands of a limited and designated class had been early pointed out and insisted upon by Aristotle, who demonstrated that political power does not flow from any abstract rights in individuals, but from a just and enlightened sense of EXPEDIENCY in each particular case, having in view the safety of the State AND THE BEST INTEREST OF THE COMMUNITY.

The inquiry how far the State may go in endeavoring to attain this latter end is a question which the statesman and social economist encounters at every turn and stage in the study of the public life of the nation or community to which his attention happens to be momentarily directed; and it can only be intelligently and prudently resolved after consideration of the experiences of other States, and in the light of the traditions and history of the particular State with reference to its fundamental law and constitution.†

* Blair v. Ridgely, 4 Missouri, 63.

† Mr. Attorney-General Bates, when discussing the question of citizenship as resultant from birth within the United States, drew the distinction sharply between *powers* and *rights*. (Opinions of Attorneys-General, Vol. X, pp. 393, 394, 399.)

At Rome, as at Athens, the inhabitants were classified by clearly-defined grades and distinctions. The superior order consisted of those who were in the full enjoyment of all the political powers, as well as the natural rights of citizens. The inferior order was made up of the proletariat classes, who were excluded from suffrage and other privileges, and whose natural rights even were greatly curtailed. Between these two divisions were other orders representing a majority of the people, whose rights were variously graduated and qualified by the laws. But the first principal division of persons in Roman law under the Republic was into *citizens* and *not citizens*. When mention was made of Roman citizens, the reference was to those who were in the full enjoyment of political rights and powers. And when Aristotle indicates the essential and determining characteristics of citizenship, he is to be understood as referring only to those members of the community who enjoy political rights and powers.

The status of a Roman citizen was composed of three constituent members, without which it never existed—*freedom, city, and family*. St. Paul's case has been cited as a leading case in Roman jurisprudence in the matter of the *jus Romanum*.*

By Roman civil law the child, until majority was attained, remained under complete subjection of the family, and during the time of minority did not bear any political relation to the State, except such as he was entitled to by virtue of parentage and membership of the family.

Tracing early Teutonic institutions, Mr. Stubbs points out that young men were, until admitted to the use of arms, members of the family ONLY—NOT members of the State. When they came to the years of discretion, and the voice of the Nation permitted it, they were formally invested with a spear and shield either by father or kinsman in the assembled council.†

III.

"In modern days, in civilized days," says Bagehot, [Physics and Politics,] "men's choice determines nearly all they do; but in early times that choice scarcely determined anything. The

* "In so far as there is any analogy between Roman and American citizenship, it is strictly applicable to us. * * * It establishes the great *protective* rights of the citizen, but, like our own National Constitution, it is silent about his *powers*. It protected Paul against oppression and outrage, but said nothing about his right of suffrage or his eligibility to office." (Opinions of Attorneys-General, Vol. X, pp. 393, 394.)

† Constitutional History of England.

guiding rule was the law of STATUS. Everybody was *born* to a place in the community; in *that place* he had to *stay*; in that *place* he found certain duties which he had to *fulfill*; and which *were all he needed to think of*. The net of custom caught men in distinct spots, and kept each where he stood."

In another connection Sir Henry Maine has pointed to the drift from *status* to *contract*, and from the *family* to the *individual*. Following the same line of thought, a contemporary American writer says:

"The old conception of the State has gone, for the individual is no longer lost in the State, but has become the special object of its solicitude, if not the very end for which it exists."

In no direction has this freedom of individual choice been more strikingly illustrated than in its relation to the transfer of allegiance from native to adopted State, and from State to State, practically at the will of the individual, and generally without limitation. The claim to an allegiance which is inalienable will hardly again be asserted by any free State; but if asserted, it will not be heeded by the dominant States. The right of expatriation is to-day well-nigh universally conceded, and citizenship (National character) has become a quality and character which depends upon contract rather than upon status. The parties to the contract (which may be express or implied) are the individual and the State. The National character which results from origin continues until legally changed; and the *onus* of proving such change usually rests upon the party alleging it. Naturalization, it has been said, is the rule of modern States. Now-a-days, among the majority of States, citizenship is derived from personal, and not from local, origin. In other words, the child is born to the citizenship of the parents; and his National character no longer depends upon the accident of birth in some particular locality.

Of the two principal tests of citizenship—the place of birth and the nationality of the father—neither is at present adopted without qualification by British, French, or American law. The laws of these countries exhibit, in fact, different combinations of the two, Great Britain and the United States laying chief stress on the place of birth, while in France the father's nationality determines, though not absolutely and in all cases, that of the child; and this

latter theory has found acceptance among other European Nations.*

"Few words," says a contemporary critic, "are used more confusedly than 'citizenship.' Originally it signified the rights of the burghers of a free city as against the King or military lord of the land. At the present day it means, when strictly and properly used, merely membership of the Nation or State, and does not imply that the individual styled 'citizen' shares political power, is one of those eligible to office, or may claim to vote."

"The phrase, 'a citizen of the United States,' without addition or qualification, means neither more nor less than a member of the Nation." †

"Citizenship, *in its narrow sense*, confers the imprescriptible right *to speak for the community*—to act as its authoritative exponent. It is the true voice of the people (*vox populi*), and *is ascertained by the general consent, as manifested in the fundamental law and in the history of the commonwealth*. It varies in different countries, and in the same country at different epochs. It may be recognized by the written law, or merely by usage and tradition. In England it is vested in the body of freeholders; in the United States and France, in the adult male citizen; in constitutional governments it utters itself through the suffrage; in others, through the power of public opinion. But the State exists by virtue of the people who compose it; no people, no State. Hence it ought to be for the people." ‡

Confusion must inevitably follow, if the distinction between *political status* and *personal* or *property* rights is not borne in mind. It is true, however, that many *personal* rights result directly from *political status*.

Under the Revised Code of Italy, which has recently gone into operation, suffrage is conferred upon all who can read and write. The English County Franchise Bill, which has passed the House

* Report of Commission, &c., Papers on Expatriation, Naturalization, and Change of Allegiance: Washington, 1873.

† "In most instances, within my knowledge, in which the matter of citizenship has been discussed, the argument has not turned upon the existence and the intrinsic qualities of citizenship itself, but upon the claim of some right or privilege as belonging to and inhering in the character of citizen. In this way we are easily led into errors both of fact and principle. We see individuals, who are known to be citizens, in the actual enjoyment of certain rights and privileges, and in the actual enjoyment of certain powers, social and political, and we inconsiderately, and without any regard to legal and logical consequences, attribute to those individuals, and to all of their class, the enjoyment of those rights and privileges and the exercise of those powers as incidents to their citizenship and belonging to them only in their quality of citizens." * * *

(Opinions of Attorneys-General, vol. X, pp. 383, 384, 388.)

‡ William Preston Johnston, "A Theory of the State."

of Commons during the present session of Parliament, and which may become a law before the next annual recess, will add two million to the number of voters in England. The result of the adoption of this measure will probably make England more democratic than the United States. The methods by which its passage through Parliament has been urged are naturally criticised by the opposition as dangerous in tendency. And it is argued that, in its effects, it threatens England with the most obnoxious of all forms of legislative power—a single assembly.

IV.

Whatever may have been the rule or usage in other times, or under other systems of government, the answer of one State to the demand of another State for indemnity and satisfaction on account of injuries to her citizen or subject, that the individual has been treated no differently than her own citizens or subjects, is not now-a-days accepted as satisfactory. It is no doubt true that whoever comes voluntarily into a country subjects himself to the laws of that country, and therein, to all remedies directed by those laws on his particular engagements. This is undoubtedly correct as a general proposition. It is, however, qualified by that principle of modern international law which insists that alien friends commorant in foreign territory shall be entitled to and shall receive protection to life, liberty, and property, independent of local custom, usage, or prejudice that is agreeable to the law of nations or treaty stipulations, and which is compatible with the safety of the State. Before this latter exigency all demands must yield. *Salus reipublicæ suprema lex*. This insistence by the State on behalf of the citizen in foreign territory is not based entirely upon selfish or narrow motives, but upon considerations of public policy and principles of international jurisprudence, which it is the interest of all States to maintain. Public policy suggests that the presence of every alien friend in a territory represents just so much material wealth or physical skill and industry added to the resources of the State. International law insists upon the adoption of a comity or rule which admits and applies the personal statute whenever circumstances arise which suggest that it ought to become operative. This does not imply, however, that the law of the State of the citizen injured is to be applied to the individual by the offending State, although in Asiatic countries such a concession has been made to the United States

and European Governments. In cases where international law may not be sufficiently determinate or explicit, it is the practice of modern States to enter into conventions and treaties with a view to indemnity for past injuries and to secure guarantees for the future. It has been said that the origin of the right which one Nation has to adopt as its own claim and to demand indemnity from another Nation for the injury done to an individual, is that the individual, being a member of the body politic, and a representative *pro tanto* of his Nation, the latter receives an injury whenever the person or property of such individual suffers wrong or injustice. When the acts of a State in respect to an alien have become so flagrant and grave and unusual as to assume an international character, they pass from the jurisdiction of municipal law, and must be resolved in accordance with international principles, or by reference to treaty stipulations, or to usage. When the law of nations is silent, resort is had to the Roman civil law, as containing the soundest and purest code for the adjustment of conflicts of law.*

A distinction has been drawn by publicists † between *domiciled persons* and *visitors in or passengers through* a foreign country, in respect to the extent to which the protectorate over the alien by his State is warranted. "The foreign domicile does not, indeed, necessarily take away this rule," says Phillimore, "but it renders the invocation of it less reasonable and the execution of it more difficult." But the manifest inconvenience of distinguishing between a *commorant* and *domiciled* alien in a commercial age, when intercommunication and foreign residence is the rule rather than the exception, must be obvious. And however well founded in principle and ethics the distinction may be regarded, or however plausible as an equity formula, it utterly fails to furnish a convenient or practical rule for decision. The citizenship (National character) of individuals may be readily determined. The contro-

* Grotius, I, ii, ch. xxv; Heffter, secs. 6, 59, 60; Vattel, I, ii, vi.

† "It has been said that every individual who enters a foreign territory binds himself, by a tacit contract, to obey the laws enacted in it for the maintenance of the good order and tranquillity of the realm. The converse of the proposition is equally true. Foreigners, whom a State has once admitted unconditionally into its territories, are entitled not only to freedom from injury, but to the execution of justice in respect to their transactions with the subjects of that State. No country has a right to set, as it were, a snare for foreigners; therefore conditions hostile to their interests, or different from general usage, must be specified beforehand."—Phillimore, *International Law*, vol. 2, pp. 3-7, 3d edition.

† Grotius, I, iii, ch. 2, sec. 7; Phillimore, *International Law*, Vol. II, pp. 3-7, 3d edition.

versy as to domicile is difficult, as well as technical and artificial, and usually provokes conflict and confusion. It may be admitted that the principle upon which the distinction between the measure of protection which a State is justified in extending to a *commorant* and to a *domiciled* alien rests, has, from time to time, found expression and sanction in text-books, in the opinions of law officers, and in the communications of Cabinet Ministers. But the adjudications of the most recent international tribunals for the settlement of alien claims have not, as a rule, regarded this distinction. These tribunals have usually been satisfied with proof of National character (citizenship) and the observance of neutrality while in foreign territory, and have not been disposed to attach much weight to the character of residence, whether long-continued or of short duration.* There can be no question but that the principle generally sanctioned by these commissions is more convenient to the individual than to the State; but it seems to correspond better with the needs of a commercial age, when a large floating population exists in most places, whose continuance depends upon the course taken by their private affairs.†

The alien who enters a foreign State is under the protection of the laws of nations. ‡ Under many conditions and circumstances, and by the usage of modern States, the alien can only be said to be subject to the jurisdiction of the State when in foreign territory in a much-qualified sense. || And the fiction of extraterritoriality is practically extended to include a large class of aliens (private citizens), in addition to foreign ambassadors, ministers, and diplomatic representatives. In a word, for purposes of protection in his political relation, the personal statute is held to follow the alien wherever he may go on a lawful errand. And in every controversy between the State of an alien and a foreign State which gives rise to an international demand for indemnity, the extent of international liability must be measured by reference to the law of nations, to private international law, and to the usage of States. § An American author insists that the obligation to treat

* U. S. and Mexican Claims Commission, July 4th, 1868; U. S. and British Claims Commission, May, 1871; French and American Claims Commission, January 15th, 1880.

† Hall, *International Law*, p. 188.

‡ Martens, *Law of Nations*, p. 226.

|| Hall, *International Law*, pp. 42, 45.

§ "States in the eye of international law thus absorb the citizens which constitute them. International law knows nothing of the individual members of States in their *citizen capacity*. Personal or private rights, as we have already seen, and as I shall again take occasion to explain, are *juris gentium*, and are internationally recognized; but citizen or public rights—the rights which are defined and measured by the public laws of separate States—are *juris gentis*, and are wholly and exclusively municipal." (Lorimer, *Institutes of the Law of Nations*, vol. II, pp. 130, 132.)

aliens with humanity, and to protect them when once admitted into a country, depends not on their belonging to a certain political community which has a function to defend its members, nor wholly on treaty, but on the essential right of human nature. *

Other writers suggest that the claim of a State to exercise a protectorate over her citizens when in foreign territory may be admitted *ex comitate gentium*, but say it may also be denied *ex justitia gentium* whenever it is deemed injurious to the interests of such foreign nations, or subversive of their own policy or institutions.† The concessions or relaxations of sovereign rights which it has become customary for civilized nations to make have given rise to a body of usage of considerable bulk called private international law.‡ The protection of the alien and alien property in foreign territory is now-a-days, and by a majority of States, assured and guaranteed by specific provisions in treaty stipulations or by well-ascertained usage; and this usually without reference to length of residence, character, or occupation. Under all circumstances, however, the maintenance of neutrality is assumed and is properly insisted on. ||

The claim occasionally made, that every State is not only sovereign in its jurisdiction, but that it of right may exercise absolute power over all persons found within its territory, without rendering such State liable for acts of injustice and wrong, is denied by usage, repudiated by the action of dominant States, and is inconsistent with the principles of modern international law. It is, in a word, negatived by a principle now generally accepted and recognized by the expression "interdependence of States." The recognition of the presence of the ethical element in modern international jurisprudence is the distinguishing feature of modern public law. States are subjects of international law, just as citizens are the subjects of municipal or national law. §

VI.

The result of an examination of the cases which have recently been passed upon by international tribunals, to whom alien

* Woolsey, *International Law*.

† Story on *Conflict of Laws*, 8th edition, pp. 754, 755.

‡ Hall, *International Law*, pp. 44, 45.

|| "And as of rights so of duties. The citizen as such has no international obligations or responsibilities. His obligations are to his own State, and are the counterpart of the rights which he has to its protection. But against other States it is through his State alone that he can assert his rights; and it is his State that is responsible for his actions." (Lorimer, *Institutes of the Law of Nations*, vol. II, pp. 130-132.)

§ Lorimer, *Institutes of the Law of Nations*, vol. I, p. 47; Hall, *International Law*, p. 36.

claims have been submitted for injuries to the person or property, as well as recent diplomatic correspondence between States on the subject, seems to sanction what has been herein stated, and to establish the following general rules or usage, by which States, if they would avoid international complications, must be governed in their dealings with aliens who are within their territory, or whose property is within the jurisdiction of the foreign State:

FIRST.—IN RESPECT TO THE PERSON AND THE PERSONAL PROPERTY OF THE ALIEN.

A. The State is not justified in arbitrarily arresting and imprisoning an alien, and under an assumed warrant of extraordinary circumstances, or by virtue of improvised municipal statutes, holding him, without reasonably prompt arraignment or trial by the ordinary courts of the land. And for the unusual, arbitrary, or cruel treatment of an alien the State is always liable to make reparation.

B. The alien is not subject to laws of conscription. Nor is his personal property liable to arbitrary seizure. But in contingencies—such as his interference or participation in the political concerns of the country—he may be apprehended, and required to leave the territory of the State.

C. It is the right of the State to expel or banish, after proper notice or warning, a turbulent or obnoxious or suspected alien, without subjecting herself to liability, pecuniary or otherwise. The State is, however, under obligation to answer the demand by the aggrieved State, and account for the harsh or extrajudicial punishment or deprivation of liberty of the citizen.*

SECONDLY.—IN RESPECT TO THE REAL PROPERTY OF THE ALIEN.

The ground for interference should be very clear. The realty is of course subject to the laws of the country where situate; but in cases where, under extraordinary circumstances, there has been a denial of justice, from National prejudice or other cause, real or assumed, the State of the injured citizen is justified in a

* Message of the President to House of Representatives, Forty-seventh Congress, First Session, Ex. Doc. 155, part 3, and accompanying papers; United States and Mexican Claims Commission, July 4th, 1868; British and American Claims Commission, May 1st, 1870; Spanish Claims Commission, February, 1871; French and American Claims Commission, January 15th, 1880.

demand for indemnity.* The exemption of the person and the personal property of the alien from arbitrary interference stands, as has been heretofore indicated, upon altogether higher and different grounds.

VII.

It would be a serious omission not to make some reference, however brief it of necessity must be, to the altered conditions in respect to citizenship in the United States, as a result of the adoption of recent amendments to the Federal Constitution, or various acts of Congress to enforce their provisions, and of decisions of the Supreme Court of the United States in cases originating thereunder. Notwithstanding radical changes in the direction of the unification of the political character, the dual citizenship (of the State and of the Federal Government), as determining jurisdiction, has been held by the court of last resort to continue for many purposes; and it thus leaves the always difficult question of the relation of the State to the Federal Government in matters of citizenship, under many aspects, a continuing subject of controversy, with which the courts are daily concerned.

The American use of the term citizen has been criticised as indistinct by an English publicist† who cannot understand how there can be a citizenship of a particular State as distinct from a citizenship of the United States. The truth is, the dividing line is not easily distinguishable. It is believed, however, that dual citizenship was recognized in Roman jurisprudence; that is, citizenship in the metropolitan city and citizenship in a municipality of the State, which were distinct and independent characters. Some years since an American commentator‡ observed that it was difficult to say, after the title of citizenship was established, what were the rights which it conferred in the United States. And a late Attorney-General|| has said that eighty years of practical enjoyment of citizenship, under the Constitution, had not sufficed to teach us either the exact meaning of the word or the constituent elements of the thing we prize so highly. The Supreme Court has pointed out some of the rights of a citizen of the United States as distinct from the rights of a citizen of a particular State.§ The court did not, however, attempt to

* Howard's Report, *British and American Claims* (May 8, 1871), pp. 285, 286.

† Westlake, *Int. Law*, p. 25.

‡ Lawrence's *Wheaton's Int. Law*, appendix, p. 903.

|| *Opinions*, vol. X, p. 388.

§ *Slaughter-House Cases*, 16 Wall., 36; *Crandall v. Nevada*, 6 Wall., 36.

enumerate or to define all the rights and powers that recent amendments and Congressional enactments had conferred upon individuals in their character as citizens of the United States. These rights, as has been heretofore demonstrated, are of a dual and distinct character, and are distinguishable into *political* and *civil* rights. The distinction is rendered the more artificial, for the reason that, under the law and usage which is almost universal, the former are derived primarily from the particular State, but are guaranteed by the United States.

In three notable cases,* the court, while indicating some of the rights of a citizen of the United States which are distinct from the rights of a citizen of a State, lays down important limitations and restrictions; and distinguishes, for jurisdictional purposes, the political rights and personal privileges of a citizen of a State from those of a citizen of the United States. The conclusions of a majority of the court in other and later cases, however, which have been discussed elsewhere, under the title "The Seven Constitutional Cases," indicate, in some manner, the great reach and scope of provisions of these amendments, in an opposite direction, under varying and complicated circumstances. †

A case of much interest is now on the docket of the Supreme Court of the United States, which involves a discussion of the scope of the first section of the Fourteenth Amendment. ‡ The case has been once heard, on allowance of a motion to advance; and after argument it was by order of the court restored to its place on the docket to be reargued when it is reached in its turn. The principal argument by counsel on behalf of the railroad company was directed to the point that corporations were comprehended in the term "person" as used in that section; and that the citizenship of the corporation justified them in invoking the jurisdiction of the Federal courts to prevent the abridgment

* *Crandall v. Nevada*, 6 Wall., 361; *The Slaughter-House Cases*, 16 Wall., 36; *Cruikshank's Case*, 92 U. S., 542.

† *Tennessee v. Davis*, 100 U. S., p. 258; *Strauder v. Virginia*, Id., p. 303; *Virginia v. Rives*, Id., p. 314; *Ex-parte Virginia*, Id., p. 340; *Ex-parte Seibold*, Id., p. 400; *Neal v. State of Delaware*, 103 U. S., p. 370; *Washington Law Reporter*, Vol. IX, p. 385.

"The Constitution nowhere attempts to declare or define the privileges and immunities of citizens of the United States. The Supreme Court shrunk from the effort in the *Slaughter-House Cases*. But they ventured to suggest some which owed their existence to the Federal Government, its national character, its constitution, or its laws." (*Dauphin v. Key*, *MacArthur and Mackey's Reports*, Supreme Court of the District of Columbia, p. 208.)

‡ *County of San Mateo v. Southern Pacific Railroad*, (U. S. District Court of California.)

by the State of California of their privileges and immunities, by deprivation of property without due process of law, and by a denial within its jurisdiction of the equal protection of the laws. When this cause was under argument, counsel for the railroad corporation was asked from the bench whether their contention was that the first clause of the first section related to artificial persons. The reply was that that clause was an after-thought; that it was a political consideration that the Senate suggested to the House after the main body of private rights had been disposed of by the House of Representatives.* It is to be observed that the second clause of the section under consideration seems to draw a distinction between "citizens" and "persons."

It is a curious fact that until the adoption of the Fourteenth Amendment and the passage of the act of Congress of April 9th, 1866, commonly referred to as the "Civil Rights Act," the word "citizen" had never been defined in any constitutional provision, in any act of Congress, or in any authoritative form.

Some of the discussions in and out of court do not always seem to bear sufficiently in mind that under many aspects the later amendments must be regarded as so many repealing acts of provisions contained in earlier amendments in respect to the restrictions on Federal power. The purpose of the earlier amendments was to restrict Federal power; the intention of the later amendments is to restrict State and to extend Federal jurisdiction. The precise extent to which this has been done must be determined by the courts; and controversies over the question are naturally a fruitful source of litigation. It will hardly be denied that as a result of recent amendments, and of Congressional enactments to carry their provisions into effect, the Constitution has undergone fundamental transformation since the late civil war. The contention on the one side is, that this change has in fact revolutionized the whole structure and plan of a composite ~~government~~, and that we have at last the energetic government of Hamilton. The insistence on the other side is that these changes were, indeed, radical, but *not* revolutionary; and that the system of Federal and State Governments which the fathers founded still remains. The present Federal Constitution, however, is a complex and complicated instrument; and it will remain such until the earlier

* One of the resolutions submitted in the House of Representatives embodied somewhat the idea that is expressed in section 1 of article 14 of the amendments. It was in these words, viz.: "All National and State laws shall be equally applicable to every citizen; and no discrimination shall be made on account of race and color."

and inconsistent amendments are stricken out or remodelled. It shows the scars as well as the fruits of a great controversy which was finally determined by the arbitrament of the sword. To systematize and harmonize it as a whole will furnish work for a Constitutional Convention. The actual situation has been meanwhile embarrassed by natural causes. But it has been further aggravated by much discordant legislation in the direction principally of acts for the removal of suits from State to Federal courts under conditions which have been too generally availed of to sanction fraud and fraudulent devices. The remedy is a repeal or modification of the obnoxious provisions in the several statutes. In the meantime the courts are embarrassed, and are not infrequently driven to resolve intricate questions by reference to the esoteric principle, which will have great weight with judicial minds under a stress of circumstances; particularly when constitutional provisions are under consideration. If the Constitution, in its present shape, is a veritable Mosaic, what must be said of those appalling volumes—the statute books of the United States? Have they any parallel except in classic story? Does not the habitual practice of legislators in the construction of statutory law recall the fable of the Sibylline leaves? * If the above is a fair statement of the condition of the Constitution and of the statutory laws, is there not sore need of a Constitutional Convention, and of a Commission to revise and harmonize the law of the land? In the meanwhile, is it to be wondered that the decisions of the highest courts are conflicting; and that, on the gravest issues, the Court of last resort not infrequently reaches a decision by a bare majority?

VIII.

It has been said that “the growth of the English Constitution is the resultant of three forces, whose reciprocal influences are constant, subtle, and intricate. These are the national character, the external history, and the institutions of the people.” † May not

* “The mysterious Sibyl (Deiphobé) has a habit of jotting down her responses in verse upon the leaves of trees—each verse apparently on a separate leaf—and then piling them one upon another in her cave. When the doors fly open, the gust of wind whirls the leaves here and there in all directions; and the ambiguities which are proper to all oracles are considerably increased in the process of rearranging the several leaves into anything like coherent order—the Sibyl herself disdaining all further interference. So that many of her clients go away without having received any intelligible answer at all, and from that time forth ‘hate the very name of the Sibyl.’”

† Stubb's Constitutional History, Preface.

the same be asserted in respect to the development of the Federal Constitution? And are the forces which work in co-ordination in a free country very different, whether the State government develops under a written or an unwritten constitution?

If it is a grave duty which devolves upon every citizen to see that no harm comes to the Republic, what must be the measure of obligation resting upon the profession in this relation? We are accounted and are accredited ministers and officers in the temple of justice erected by the State. Many are permitted reverently to keep watch and ward over the Constitution and the laws; while the more favored are called to sit in judgment. We rightly claim for the profession great dignity and honor by reason of this privilege and preferment. And we may not decline a large measure of responsibility in the affairs of State, as well as in the administration of law. It seems to be the habit in some quarters to depreciate and minimize the efforts and labors of this organization. But surely an association whose object is "to advance the science of jurisprudence, promote the administration of justice and uniformity of legislation throughout the Union, uphold the honor of the profession of the law, and encourage cordial intercourse among the members of the American Bar," must be of value to its members and of advantage to the community.

No one will, I believe, deny that the opportunities and responsibilities of the profession in the United States to-day are correspondingly great. We are living in a great formative period of constitutional history; possibly as important and far-reaching as that remarkable epoch which was embraced in the judicial life of the great Chief Justice, to whose memory and honor the Bar of the country and Congress have recently unveiled an imposing statue at the Federal Capital.

If I am asked, in this connection, "What is the immediate duty and relation of the profession to the State, and what its peculiar office?" I answer, as is the practice of the profession, by referring to the authorities. Savigny describes modern law as composed of two elements—the one element being a part of the National life itself, and the other element being the product of the lawyer's craft. The first he names the political and the last the technical element.*

An American publicist,† a member of this association, whose

* Austin, Jurisprudence.

† David Dudley Field, International Code.

labors in the highest walks of the profession have been the subject of approval and endorsement in Europe and America, has recently asked and answered the question, "What is the duty of the lawyer?"—

"It is his duty, first, to know the law; next, to apply it, and always to make it subserve the purpose for which it was designed—that is, to keep the peace, do justice, and thus promote human happiness. If it fails to accomplish these ends, if it works badly in any respect, it is his duty, more than that of other men, to help make it better. Why, it may be asked, is the lawyer, more than another citizen, bound to improve the law? Because he knows it more completely, sees with greater clearness the points of friction, and has the means of correcting and improving it more at his command than the unprofessional citizen. He is in fact a minister of the law, set apart of his own seeking for that very purpose, and his duty follows his relation."

Another authority says:

"The law is regarded and administered by lawyers from many points of view. Among these we think that there is at least one point of view which is essential to the healthy tone and the usefulness of the profession. IT IS THE CREATIVE POINT OF VIEW. It is the inquiry, What laws do the people need from both legislatures and judges? It is not the question of mere theorists or *doctrinaires*. They can neither answer nor understand such a question, because they do not study the people in common life. Nor is it the bid of demagogues. THEY ask, not what the people need, but what does our party depend on?"*

There exists too generally a misconception as to the obligation which is incident to the relation between lawyer and client, which is productive of great evil and scandal. This misconception has unfortunately received the sanction of some great names. Fidelity to the client and the client's interest is one thing; participation in the crime of his client, by poisoning the fountain-springs of Justice, or outraging law and decency within the very precincts of the temple, is something very different. The lawyer owes much to his client, but he owes more to himself and to the State. It will be remembered that Æneas, when journeying through the land of shadows, was shown the prison cells reserved for the betrayer of trust, the faithless patron:

*"Hic, quibus invisi fratres, dum vita manebat,
Pulsatusve parens, et fraus innexa clienti."*

Lord Cockburn's qualification and restriction on Lord Brough-

* C. E. Grinnell, in *American Law Review*.

am's well-known overstatement of the duties of an advocate commands the approbation of the profession. In his *elogé* of Erskine, the late Chief Justice of England thus described the character of his subject:

"He wielded the arms of the warrior, not [the weapons] of the assassin; he strove to accomplish the interests of his client *per fas* and not *per nefas*, and sought to reconcile the interest he was bound to maintain and the duty it was incumbent upon him to discharge with the stern and immutable interests of truth and justice."

IX.

From the following reference to a diplomatic episode, which is taken from the Madrid letter of a correspondent of a daily New York journal of recent date,* it will be seen that the United States is sometimes overreached in international contentions with States whose power or skill she may occasionally seem to depreciate. But it does not often happen, as in this instance, that she is the victim of the temerity or pusillanimity of her own citizens and representatives.

"When the Spanish-American Commission in Washington came to a deadlock on the question of citizenship, of course negotiations were opened between the two Governments. Spain maintained her right to go behind the naturalization papers. The United States stood firmly for the contrary. No progress was made in the negotiation. Mr. Webster came to the rescue. He was trusted implicitly by the Spanish Foreign Office. The Spanish Minister at Washington was instructed to follow the directions of Mr. Webster. That clever and experienced lawyer drafted an article for the proposed treaty on the subject of citizenship. He also instructed the Spanish Minister to adhere in all his conferences with Secretary Frelinghuysen to a certain set of phrases. He had an apt pupil. Mr. Frelinghuysen accepted Mr. Webster's proposed article, and a treaty or additional article was agreed upon. The Spanish-American Commission reconvened, and in due time the question of citizenship was reached. The new article had to be construed, very much to the amazement of the American Secretary of State. *The majority of the Commission held that Mr. Webster's language did not mean what it was supposed to mean.*"

The incident thus briefly referred to involves a question in private international jurisprudence of wide reach, and possesses an

* New York Times, July 19th, 1884.

NOTE.—That portion of the statement of the Madrid correspondent which appears in

importance much beyond that which momentarily attaches to the individual or pecuniary interests immediately affected by the final decision of the Arbitrators. This decision violates a principle of interpretation in jurisprudence which was supposed to be immutable, and reverses a long-standing rule of evidence in respect to the burden of proof. And the principle which it seeks to establish affects not one individual, nor a few individuals, but every naturalized citizen that is or is to be. It concerns not alone Spain and the United States, but every State which makes claim to civilization and honesty. It is far-reaching; and unless disavowed and repudiated, will be disastrous in its effects. It attempts to commit the representatives of the United States to a position in respect to naturalized citizens which they cannot consistently assume, unless they turn their backs upon American traditions, reverse a uniform policy, disregard the declarations of repeated Executive proclamations, and repudiate successive acts of Congress. But more than this: the conclusion of the Arbitrators is in flagrant violation of the specific declaration of principles agreed upon by the two States, whose agents the Arbitrators were. The controversy promises to be memorable in the history of the diplomatic relations of the United States; and a brief statement of the circumstances which gave rise to the discussion may be of general interest to the profession.

The declaration of principles contained in the additional article referred to, which was announced at a session of the Commission held December 14th, 1882, was in the language following:

“That the principles mentioned in the instruction of the Secretary of State to the Advocate for the United States, dated the 25th September, 1882, are concurred in, and the following rules have been adopted by them [the Arbitrators], viz.: When an allegation of naturalization is traversed, and the allegation is established *prima facie* by the production of a certificate of naturalization, or by other competent and sufficient proof, the allegation can only be impeached by showing that the court which granted the judgment of naturalization was without jurisdiction, or by showing, in conformity with the adjudications of the courts of the United States on similar matters, that fraud, consisting of intentional and dishonest misrepresentation or suppression of material facts by the party obtaining the judgment, was practiced upon it, or that the naturalization was granted in violation of a treaty stipulation or of a rule of international law; and that naturalization invests the individual with the rights of a citizen of his adopted country in the country of origin or elsewhere not less than in the country of adoption.

"And the Arbitrators added that they would transmit these rules in due form to the Umpire, that he may be guided by them in the cases not yet decided by him."

The original Agreement of February 11th, 1871, under which the Arbitrators between Spain and the United States were appointed, contained a clause to this effect :

"Nevertheless, in any case heard by the Arbitrators, the Spanish Government may traverse the allegation of American citizenship ; and thereupon *competent and sufficient proof thereof will be required.*"

Upon this clause the Advocates on the part of Spain, in all the preliminary contentions, had rested their arguments, but they had been successively overruled by the previous Umpires.

At this juncture a number of cases in which the jurisdiction of the Commission depended on the question of citizenship by naturalization, which had been suspended awaiting the decision of the two Governments, remained—some in the hands of the Arbitrators and others in the hands of the Umpire.* A few days only of the life of the Commission remained. The two Arbitrators then took up the very cases which had led to the adoption by their Governments of the declaration of the principles which should guide them as to naturalization; and the Arbitrator on the part of the United States, virtually repudiating the decision of the two Governments, proceeded to enter into an examination of the evidence before him to ascertain—not whether the judgment of naturalization was shown to be tainted with fraud ; not whether it was shown to have been obtained in violation of controlling adjudications of the courts of the United States ; not whether the record before the Commission showed that the court which had admitted the applicant to citizenship had been misled, by false swearing or otherwise, as to any *fact* material to be then considered, and which was necessarily passed upon in the judgment of naturalization, but whether that court, in applying the law to the facts, had not itself fallen into *error* as to what constitutes *residence* within the intent of our act of Congress; and whether the *residence* of the applicant within the United States had indeed been continuous and uninterrupted—not according to any defini-

* Before the Umpire: Christobal Madan v. Spain, No. 45; and other cases. Before the Arbitrators: J. J. Rodriguez and Randolph Coyle, Administrators of Ramon Fernandez Criado y Gomez, v. Spain, No. 29; J. M. Mestre, Executor of Jose Garcia Angarica, v. Spain, No. 17; and other cases. (*Law Library, Department of State, Washington.*)

tion ever heretofore applied to such cases in the particular court, or in any other court deciding such questions, but according to a singular misconception or superficial reading of a half definition of domicile recently devised and apologized for by its English author (*Dicey*) when discussing the law of DOMICILE "*as a branch of the law of England*" — which excludes entirely the element of intention, and would make one's residence for any given period within any jurisdiction depend merely upon the question whether he had been physically there present *for the greater part* of that period; and by which definition *one would be a resident within the jurisdiction for and during the entire month of July* (for instance) if there physically present only on the first day of the month and on each alternate day designated by an odd number; and yet *would not be a resident there during any one of the fifteen alternate days of that month designated by an even number* if he were on those days physically absent. Such a definition of residence is of course absurd in any case where the term is employed in the sense in which it appears in our act of Congress now under consideration. It would re-enact the provision which in 1848 (*act of June 24th, 1848*) was by Congress deliberately stricken out of a previous statute (*act of March 3d, 1813*), and which had required that the applicant for naturalization should not have been absent from the United States at any time during the probationary period of five years; for *any* interruption of the continuity of the residence intended by the act, whether for a month or *for a minute only*, destroys the usefulness of residence during the ~~remainder of that probationary period~~, and necessitates *another period* of residence for five years, dating from the renewal of residence after the interruption, before the applicant can be naturalized.

By that method of inquisition into the records of naturalization, the Arbitrator of the United States deliberately overruled the courts which had adjudged the claimants to be citizens of the United States, and, reaching a conclusion not only adverse to the claimants, but in opposition to the oft-repeated declarations of principles by his own Government, and in direct violation of the spirit, if not the letter, of the act of July 27th, 1868;* and contrary to the specific declaration of principles announced at the session of the Commission held December 14th, 1882, arbitrarily refused to accept the judgments of naturalization as sufficient, but

*Revised Statutes of the United States, sections 1,999, 2,000.

portion already elapsed,

dismissed the claims for want of jurisdiction in the Commission to make awards to the claimants, for that he chose not to consider them citizens of the United States. The process of reasoning by which that result was reached is as remarkable as the result itself. It was not only necessary for the Arbitrator on the part of the United States to introduce a new test of American citizenship, but he was forced to set aside all presumptions of law, and to reverse the doctrines and overrule the decisions of authoritative courts, as well as to disregard the precedents of this Commission itself as to what constitutes fraud and what is sufficient proof of citizenship in cases arising under the Agreement. The Arbitrator on the part of Spain, although, in the first instance, he would hardly, in the presence of the declaration of principles assented to by his Government, have gone as far as his American colleague had traveled, concurred in the decision of dismissal.

Meanwhile the Umpire,* before whom several claims of other claimants, the jurisdiction of which turned on citizenship by naturalization under circumstances to all intents and purposes similar, recognized the American citizenship of claimants, saying he considered himself obliged to do so *in view of the declaration of principles subscribed and submitted by the two Governments* for the guidance of ARBITRATORS and UMPIRE; and large awards were thereafter actually made in favor of such claimants by the Umpire.† Of course neither the United States, *with their record in respect to the equal protection of naturalized and native citizens* clear and uninterrupted, nor the claimants, whose treatment was so unusual and unequal, could be satisfied with this remarkable issue of the naturalization question. The matter is a present subject of controversy between the diplomatic representatives of the United States and those of Spain, upon the issue of which, as is mysteriously given out in semi-official circles, will depend the fate of Cuba; and it is gravely hinted that Bismarck holds the issue in his keeping.

The above presents the serious aspect of this most recent incident in the practice of International Commissions.

The amusing feature of this episode is that, while the controversy was in progress, Spain, or some representative or advocate

* Count Lewenhaupt, Envoy Extraordinary and Minister Plenipotentiary from Sweden to the United States.

† Cristobal Madan v. Spain (No. 45); Felix Govin y Pinto v. Spain (No. 9); Manuel Antonio Montejo v. Spain (No. 115); John C. Rojas v. Spain (No. 69). (*Law Library, Department of State, Washington.*)

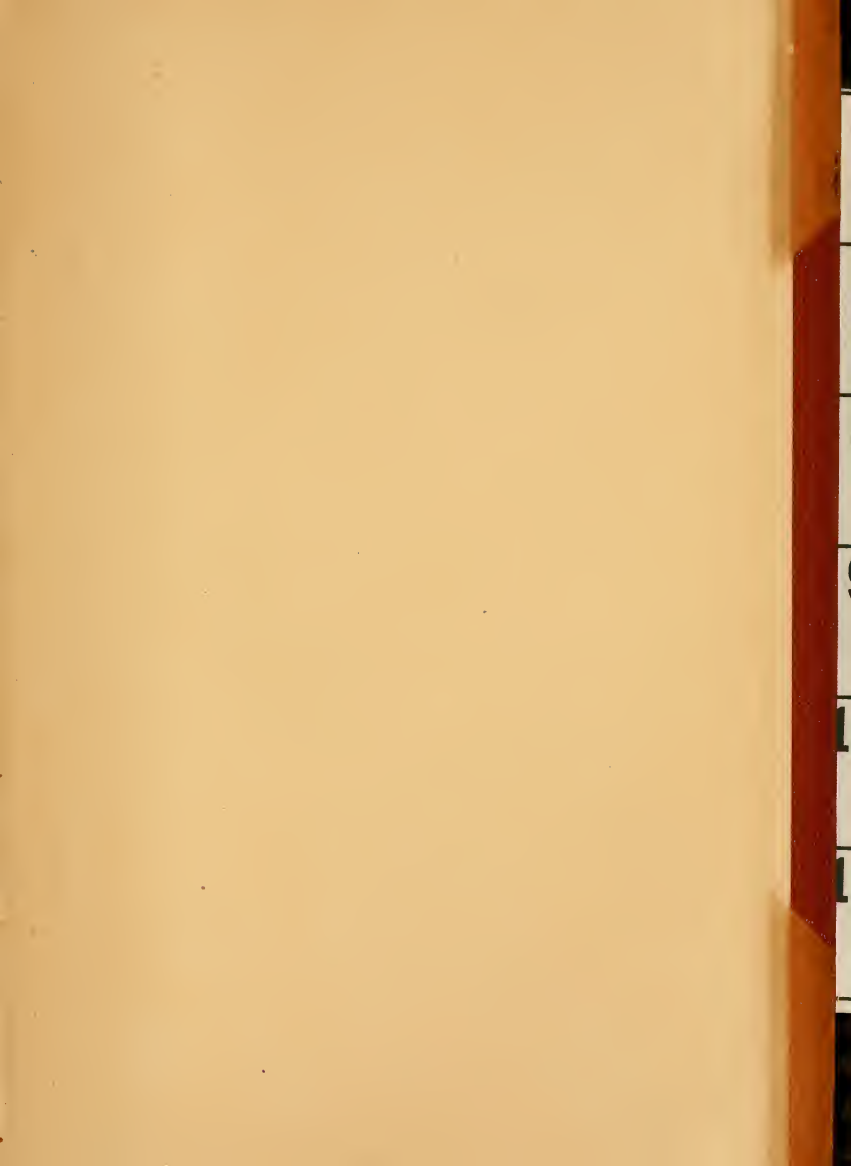
of Spain in the United States, who appears at that time to have had facile control of the editorial columns of certain New York daily newspapers,* contributed learned articles on the naturalization question in relation to the jurisdiction and functions of International Commissions, which were skillfully designed to prepare the way for the reception of the new doctrine of citizenship by naturalization thus sought to be introduced into private international jurisprudence.

*New York *Herald*, June 10th, 1881; May 4th, 1881; May 4th, 1882; July 22d, 1882. New York *World*, April 30th, 1881; May 22d, 1881; December 13th, 1881; December 22d, 1882.









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